

City v. PBA, 43 OCB 74 (BCB 1989) [Decision No. B-74-89 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,	Decision No. B-74-89
Petitioner,	Docket No. BCB-1190-89
	(A-3158-89)

-and-
THE PATROLMEN'S BENEVOLENT
ASSOCIATION,
Respondent.

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DECISION AND ORDER

On August 4, 1989, the City of New York appearing by its Office of Municipal Labor Relations ("the City"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Patrolmen's Benevolent Association ("the Union") on behalf of Police Officers assigned to the Warrant Division. The Union filed an answer to the petition on August 10, 1989. The City filed a reply on August 21, 1989.

Background

On March 20, 1989, the Union filed an informal grievance regarding "Transfer to Detective Bureau." The Union claimed that the Police Department ("Department") has failed to promote Police Officers who have fulfilled the qualifications for promotion set

forth in Interim Order No. 60,¹ the Career Program for Police Officers. The informal grievance was denied on May 31, 1989 and,

¹ Interim Order No. 60 establishes a point system by which police officers become eligible to request a transfer to a precinct of choice, non-precinct assignment or investigative assignment after accumulating the required number of points. Interim Order No. 60 provides in relevant part as follows:

2. The goal of the program is to provide a comprehensive personnel management system that:

- a. Allows the department to place and promote qualified, experienced officers.
- b. Permits police personnel on their own initiative to become qualified for their own assignment and career preference . . .

3. The objectives of this program include the assignment and advancement of personnel based on job experience, job performance and personal development. A point system to reflect these accomplishments has been formulated... After compiling a minimum of fifteen (15) points, a police officer becomes eligible to request a Career Program Transfer

* * *

5. All Career Program transfers will be made commensurate with the needs of the Department

* * *

15. It must be clearly understood by all that there are NO AUTOMATIC OR BUILT-IN GUARANTEES in this program. Fulfilling the Career Program requirements for an assignment or promotion will not automatically guarantee that an assignment or promotion will be made. Fulfilling the requirements establishes eligibility and subsequent consideration for assignment and/or promotion.

16. . . . The department absolutely retains its managerial prerogatives. This Career Program does not limit or change the department's rights or managerial prerogatives to assign and promote police personnel [emphasis in original].

* * *

on June 13, 1989, the Union filed a grievance at Step IV of the grievance procedure. On July 10, 1989, the Step IV grievance also was denied.

No satisfactory resolution of the dispute having been reached, on July 18, 1989, the Union filed a request for arbitration claiming that the Department's "Failure to transfer twenty (20) members of the Warrant Division to the Detective Division" violated Interim Order No. 60. As a remedy, the Union requests the "Immediate transfer of grievants to [the] Detective Division together with retroactive credit."

Positions of the Parties

City's Position

The City claims that the Union's request for arbitration must be denied because Interim Order No. 60 does not fall within the contractual definition of the term "grievance" set forth in Article XXIII, Section 1a of the collective bargaining agreement between the parties.² In support of its position, the City notes

² Article XXIII, Section 1a of the agreement states as follows:

For the purposes of this Agreement the term "grievance" shall mean:

1. A claimed violation, misinterpretation or inequitable application of the provisions of this Agreement;

2. A claimed violation, misinterpretation or misapplication of the rules, regulations, or

(continued...)

that this Board has held that the establishment of objective means of selecting personnel for assignment and promotion encompassed within Interim Order No. 60 is not a mandatory subject of bargaining.³ Rather, it is the type of "judgement reserved to the City by [the management rights provision set forth in] Section 12-307b [of the New York City Collective Bargaining Law ("NYCCBL")]."⁴ The collective bargaining

² (...continued)

procedures of the Police Department affecting terms and conditions of employment, provided that, except as otherwise provided in this Section 1a, the term "grievance" shall not include disciplinary matters;

3. A claimed violation, misinterpretation or misapplication of The Guidelines for Interrogation of Members of the Department referred to in Article XX of this Agreement;

4. A claimed improper holding of an open-competitive rather than a promotional examination;

5. A claimed assignment of the grievant to duties substantially different from those stated in the grievant's job title specification.

³ Decision No. B-24-87.

⁴ Section 12-307b of the New York City Collective Bargaining Law provides in relevant part as follows:

It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action;

(continued...)

agreement, in relevant part, defines a grievance as a claimed violation of the rules, regulations and procedures of the Department affecting "terms and conditions of employment." The City contends, however, that Interim Order No. 60 deals with non-mandatory subjects of bargaining, does not affect terms and conditions of employment and, therefore, does not come within the contractual definition of a grievance.

The City further argues that the request for arbitration must be denied because the Union has failed to establish a nexus between Interim Order No. 60 and the grievance sought to be arbitrated. The City notes that Interim Order No. 60 establishes the requirements necessary for Police Officers to be eligible for assignment or promotion to the unit of their choice. It does not, however, guarantee such assignment or promotion. Therefore, the City contends, "[w]hile Interim Order No. 60 addresses the

⁴ (...continued)

relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. (Emphasis added)

transfer of police personnel in a general sense, it provides no contractual right to a transfer."

Union's Position

The Union disputes the City's assertion that it has failed to establish the necessary nexus between Interim Order No. 60 and the failure to transfer Police Officers from the Warrant Division to the Detective Division. To the contrary, the Union claims that Interim Order No. 60 "directly addresses the violation cited in the instant grievance." Moreover, the Union argues, inasmuch as Interim Order No. 60 establishes the Department's own program with respect to the transfer of police personnel, it "must be administered fairly and impartially and without preferential treatment for any individual or class of individual."

The Union also disputes the City's assertion that the request for arbitration must be denied because Interim Order No. 60 does not fall within the contractual definition of the term "grievance." The Union claims that Interim Order No. 60 is a procedure of the Department which affects terms and conditions of employment and, therefore, falls within the definition of a grievance set forth in Article XXIII, Section 1a (2) of the collective bargaining agreement between the parties.

Finally, with regard to the City's contention that Interim Order No. 60 does not fall within the contractual definition of the term "grievance" because it concerns a non-mandatory subject

of bargaining, the Union argues that even if Interim Order No. 60 is to be considered a non-mandatory subject of bargaining "there is nothing limiting the grievance and arbitration machinery to mandatory subjects of bargaining...." Accordingly, the Union submits that its request for arbitration should be granted.

Discussion

In considering challenges to arbitrability, this Board has a responsibility to ascertain whether a prima facie relationship exists between the act complained of and the source of the alleged right, redress of which is sought through arbitration. Thus, where challenged to do so, a party requesting arbitration has a duty to show that the contract provision invoked is arguably related to the grievance to be arbitrated; and that the parties have agreed to arbitrate the type of dispute set forth in the challenged request for arbitration.⁵ In addition, in cases where the City asserts that the procedure in question is justified because it is a management right, the Union must show that a substantial issue under the collective bargaining agreement has been presented.⁶

The City argues initially that the grievance at issue in the instant matter is not arbitrable because it does not come within the contractual definition of the term "grievance" set forth in

⁵ Decision Nos. B-52-88; B-35-88; B-13-87

⁶ Decision Nos. B-16-87; B-8-81

the parties' agreement. The Union, on the other hand, claims that the failure to transfer Police Officers from the Warrant Division to the Detective Division violates Interim Order No. 60. Inasmuch as Interim Order No. 60 is a rule, regulation or procedure of the Police Department, the Union maintains that it has stated a claim which is arbitrable under the collective bargaining agreement.

The definition of a grievance contained in Article XXIII, Section 1a of the parties' Agreement provides that "A claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the Police Department affecting terms and conditions of employment" may provide the basis for an arbitrable claim. It is not disputed that Interim Order No. 60 is a "rule, regulation, or procedure" of the Department. The parties dispute, however, whether the provisions of Interim Order No. 60 "affect terms and conditions of employment" in order to constitute the basis for a claim within the contractual definition.

In considering the City's contention that the subject matter of Interim Order No. 60 involves the exercise of management prerogative and not "terms and conditions of employment," we note that in prior decisions, this Board, as well as the New York State Public Employment Relations Board ("PERB"), has held that the setting of qualifications for initial employment or for

promotion is not a mandatory subject of bargaining.⁷ Instead, we have held that "the establishment of qualifications for advancement and promotion fall well within the realm of those powers reserved to the City by Section [12-307(b)]."⁸ Indeed, in Decision No. B-24-87, aff'd, Caruso v. Anderson, Index No. 17123/87 (1st Dept., Dec. 22, 1988) we determined that the implementation of Interim Order No. 60 is a non-mandatory subject of bargaining.

It is well-established that the parties to a collective bargaining agreement may agree voluntarily to limit an area of management prerogative.⁹ A dispute concerning a non-mandatory subject of bargaining will proceed to arbitration if it is demonstrated that the parties have agreed to arbitrate disputes of that nature. It is clear, however, that a non-mandatory subject of bargaining remains within the City's statutory management right if it is not limited by the parties in their agreement.¹⁰

⁷ West Irondequoit Board of Education, 4 PERB 4511, aff'd 4 PERB 3070 (1971); Association of Central Office Administrators, 4 PERB 4509, aff'd., 4 PERB 3058 (1971); Board of Education of the City School District of New York, 12 PERB 3037 (1979); Decision No. B-24-87

⁸ Decision No. B-24-87. See also, Decision Nos. B-64-89; B-38-86.

⁹ Decision Nos. B-67-88; B-53-88; B-31-87; B-14-87

¹⁰ Decision Nos. B-64-89; B-4-89; B-62-88; B-5-80.

In the instant case we find that the Union has presented no evidence to show that Interim Order No. 60 affects terms and conditions of employment, as required by the definition of a grievance, or that Interim Order No. 60 constitutes a limitation on the City's right to exercise its management rights under Section 12-307(b) of the NYCCBL. Neither the collective bargaining agreement nor Interim Order No. 60 provides that a Police Officer is entitled to or guaranteed a particular assignment or promotion upon completion of the qualifications set forth in Interim Order No. 60. In fact, the Department expressly reserved its statutory management rights, as demonstrated in the language of paragraph 15 of Interim Order No. 60:

It must be clearly understood by all that there are NO AUTOMATIC OR BUILT-IN GUARANTEES in this program... This Career Program does not limit or change the department's rights or managerial prerogatives to assign and promote personnel....[emphasis in original]

Thus, while it is clear that the City and the Union have agreed to arbitrate grievances, and that this obligation includes claimed violations of rules, regulations or procedures of the Department affecting terms and conditions of employment, we find that the alleged violation of Interim Order No. 60 at issue in the case herein does not "affect terms and conditions of employment" within the contractual definition of the term "grievance" and, therefore, the Union's request for arbitration must be denied.

We also find that the Union has failed to establish a nexus between Interim Order No. 60 and the alleged failure of the Department to promote Police Officers from the Warrant Division to the Detective Division. Interim Order No. 60 expressly preserves the Department's management right to establish qualifications for the assignment and promotion of police personnel to the City. This right has not been limited by the parties' contractual agreement and, accordingly, the Department's authority in this area remains unrestricted.

Finally, with regard to the Union's claim that Interim Order No. 60 "must be administered fairly and impartially and without preferential treatment for any individual or class of individual" because it establishes the Department's own program with respect to the transfer of police personnel, we note that the Union has not presented any basis to support its conclusory allegation. Moreover, we note that in prior decisions this Board has held that the determination that some types of experience are more valuable than others in preparing employees for promotion is a decision reserved to the City by Section 12-307(b) of the NYCCBL.¹¹

Accordingly, for all of the reasons stated above, we shall deny the Union's request for arbitration; and grant the City's petition challenging arbitrability.

¹¹ Decision No. B-24-87.

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petition challenging arbitrability filed by the City of New York be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by the Patrolmen's Benevolent Association be, and the same hereby is, denied.

DATED: New York, New York
December 18, 1989

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

DEAN L. SILVERBERG
MEMBER